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*Attorneys for Defendant*

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**SAN JOSE DIVISION**

| | |
|---|---|
| SEBASTIAN BROWN PRODUCTIONS, LLC,<br><br>Plaintiff,<br><br>v.<br><br>MUZOOKA, INC.,<br><br>Defendant. | Case No.: 15-CV-01720-LHK<br><br>**DEFENDANT'S NOTICE OF MOTION AND MOTION TO DISMISS AMENDED COMPLAINT, AND IN THE ALTERNATIVE, FOR JUDGMENT ON THE PLEADINGS**<br><br>**Date: March 10, 2016**<br><br>**Time: 1:30pm**<br><br>**Dept: Courtroom 8, 4th Floor**<br><br>**Hon. Lucy H. Koh** |

**DEFENDANT'S NOTICE OF MOTION AND MOTION TO DISMISS AMENDED COMPLAINT, AND IN THE ALTERNATIVE, FOR JUDGMENT ON THE PLEADINGS**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on March 10, 2016 at 1:30pm, or as soon thereafter as the matter can be heard, before the Hon. Lucy H. Koh in Courtroom 8, 4th Floor of the United States District Court for the Northern District of California, San Jose Division located at 280 South First Street, San Jose, California, 95113, Defendant Muzooka, Inc. ("Muzooka") will and hereby does move the Court to dismiss Plaintiff Sebastian Brown Productions, LLC's ("SBP") Amended Complaint and the action against Defendant in its entirety pursuant to Fed. R. Civ. P. 12(b)(6), and in the alternative, for judgment on the pleadings in Muzooka's favor pursuant to Fed. R. Civ. P. 12(c).

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The grounds for the motion are that Plaintiff's Amended Complaint fails to state a claim upon which relief may be granted because it contains insufficient facts to state a plausible claim for relief, and fundamentally lacks a cognizable legal theory of relief. Plaintiff fails to sufficiently allege ownership of priority rights in its MUZOOK trademark to make a plausible claim of trademark infringement and related unfair competition. Plaintiff's Registration No. 4,419,977 for its asserted mark, upon which Plaintiff wholly bases its claim of priority trademark rights, is invalid due to an improper assignment of the intent-to-use application from which Registration No. 4,419,977 matured. Plaintiff thus cannot claim priority trademark rights over Defendant in this action. Additionally, the facts alleged in Plaintiff's Amended Complaint fail to set forth a plausible claim of likelihood of confusion between the parties' trademarks. Plaintiff's claims for trademark infringement and related unfair competition thus fail as a matter of law.

This Motion is based on the pleadings and papers on file in this action, this Notice of Motion, the accompanying Memorandum of Points and Authorities, the accompanying Request for Judicial Notice, and such other evidence and arguments as may be presented to the Court at the time of the hearing of this Motion.

Respectfully submitted,

Dated: December 29, 2015

By: */s/ Otto O. Lee*

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*Attorneys for Defendant*

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**SAN JOSE DIVISION**

SEBASTIAN BROWN PRODUCTIONS, LLC,

Plaintiff,

v.

MUZOOKA, INC.,

Defendant.

Case No.: 15-CV-01720-LHK

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT, AND IN THE ALTERNATIVE, FOR JUDGMENT ON THE PLEADINGS**

**Date:** **March 10, 2016**

**Time:** **1:30pm**

**Dept:** **Courtroom 8, 4th Floor**

**Hon. Lucy H. Koh**

## MEMORANDUM OF POINTS AND AUTHORITIES

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## I. STATEMENT OF ISSUES

Whether Plaintiff's Amended Complaint fails to set forth sufficient factual matter to state plausible claims for trademark infringement and related unfair competition against Defendant where the trademark registration upon which Plaintiff bases its priority rights is invalid and the Amended Complaint contains only conclusory and implausible allegations of likelihood of confusion.

## II. FACTUAL AND PROCEDURAL BACKGROUND

### A. Defendant's MUZOOKA Mark and Music Streaming Platform

Around 2010, Shawn Wilson and Chester Aldridge conceived of the idea for a social music streaming platform available to users through a website and mobile device application. (Declaration of Shawn Wilson, Dkt. No. 15 ("Wilson Decl.") ¶ 10; Declaration of Chester Aldridge, Dkt. No. 15 ("Aldridge Decl.") ¶ 6.) The platform was to be called MUZOOKA, and was to be run through the innovative startup Muzooka, Inc. ("Muzooka"). On June 1, 2010, Shawn Wilson registered the domain muzooka.com on behalf of Muzooka. (Wilson Decl. ¶ 10; Aldridge Decl. ¶ 7.) On June 4, 2010, Muzooka was organized in Delaware as Ivory Octaves, LLC ("Ivory Octaves"). (*Id.*) Ivory Octaves was converted to Muzooka on January 1, 2013 through filing of a certificate of conversion in Delaware. (Wilson Decl. ¶ 8.) On December 19, 2011, Muzooka, under the name Ivory Octaves, filed an application to register the mark MUZOOKA with the United States Patent and Trademark Office ("USPTO") in connection with its social music streaming platform. (*Id.* ¶ 11; Aldridge Decl. ¶ 8; Declaration of Otto O. Lee, Dkt. No. 17 ("Lee Decl.") ¶ 9.) Muzooka began using the MUZOOKA mark in commerce at least as early as December 2011, and the mark registered with the USPTO on December 10, 2013 under Registration No. 4,448,314, conferring rights in the mark as of the December 19, 2011 filing date. (*Id.*). Muzooka now offers its popular social music streaming platform through its website muzooka.com and through iPhone and Android mobile applications under the mark MUZOOKA.

### B. Plaintiff's MUZOOK Applications – Improper Assignment and Application Abandonment

The individual J. Michael Miller applied for the mark MUZOOK under Application Serial No. 85/420,834 on September 12, 2011 based upon an intent to use the mark under Section 1(b) of the Trademark Act in connection with services including providing collaboration and telecommunication access. (Amended Complaint ("Am. Compl.") ¶ 11.)[1] On October 1, 2011, J. Michael Miller assigned the pending intent-to-use application, Serial No. 85/420,834, to SBP. (*Id.* Ex. C.) At the time of the assignment, no Statement of Use or Amendment to Allege Use had been filed for Serial No. 85/420,834. (*See* Request for Judicial Notice filed herewith ("Req. for Jud. Not.") Exs. A, D.)

On August 21, 2013, following an initial insufficient attempt to divide Serial No. 85/420,834, SBP filed a Request to Divide Application Serial No. 85/420,834 into two applications: (1) a parent application, which would retain Serial No. 85/420,834, containing services for which SBP did not claim the mark was in use; and (2) a child application, which would assume Serial No. 85/980,000, containing services for which SBP did claim the mark was in use. (*See id.* Exs. A, B.)[2] SBP

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[1] The full listing of services contained in the original Application Serial No. 85/420,834 is as follows: "Collaboration services; collaboration services delivered over the Internet and/or over another publicly accessible network; collaboration services for enabling persons such as writers, musical artists and illustrators to collaborate with each other over a publicly accessible network; collaboration services for enabling persons such as writers, musical artists and illustrators to collaborate with each other to create works incorporating multiple media elements such as narrative textual content, music and illustrations in works of fiction and non-fiction; collaboration tools for enabling persons such as writers, musical artists and illustrators to collaborate with each other to create works incorporating multiple media elements such as narrative textual content, music and illustrations in works of fiction and non-fiction, namely email services and/or informational services; downloads of applications for reading works incorporating multiple media elements such as narrative textual content, music and illustrations in works of fiction and non-fiction for electronic devices such as smartphones, computers, e-readers, and I pads (TM); collaboration services for enabling persons such as writers, musical artists and illustrators to collaborate with each other over a publicly accessible network to compose e-books; and works incorporating multiple media elements such as narrative textual content, music and illustrations in works of fiction and non-fiction for electronic devices such as smartphones, computers, e-readers, and I pads (TM)."

[2] Following processing by the USPTO, the child application, Serial No. 85/980,000, listed the services "Collaboration services, namely, telecommunication access services which allow parties to view, adapt, and share materials such as narrative textual content, music and illustrations in works of fiction and non-fiction to enable persons such as writers, musical artists and illustrators to collaborate with each other within or across disciplines to compare work over a publicly accessible network to compose e-books and works incorporating multiple media elements such as narrative textual content, music and illustrations in works of fiction and non-fiction for electronic devices such as smartphones, computers, e-readers, touchscreen computers, and tablets." The parent application, Serial No. 85/420,834, listed the services "Collaboration tools and services, namely, telecommunication access services allowing parties to view, listen to, adapt, and share materials; collaboration tools and services, namely, telecommunication access services which allow parties to view, listen to, adapt, and share materials delivered over the Internet and over another publicly accessible network; collaboration tools and services, namely, telecommunication access services allowing parties to view, listen to, adapt, and share materials, for enabling persons such as writers, musical artists and illustrators to collaborate with each other over a publicly accessible network; collaboration tools and services, namely, telecommunication access services allowing parties to view, listen to, adapt, and share materials for enabling persons such as writers, musical artists and illustrators to collaborate with each other to create works incorporating multiple media elements such as narrative textual content, music and illustrations in works of fiction and non-fiction; collaboration services, namely, providing email services and information services, namely, information transmission services via digital networks to allow shared collaboration for enabling persons such as writers, musical artists and illustrators to collaborate with each other to create works incorporating multiple media elements such as narrative textual content, music and illustrations in works of fiction and

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simultaneously filed a Statement of Use for the in-use services which were to be listed in the new child application. (*See id.* Ex. C.) In the Statement of Use, SBP claimed a date of first use in commerce of the MUZOOK mark with the listed services of August 14, 2013. (*Id.*) Thus, the child application, born out of the original MUZOOK application filed on September 12, 2011, would be allowed to proceed toward registration with alleged in-use services, while the parent application would remain an intent-to-use application. The child application matured into Registration No. 4,419,977 on October 15, 2013. (Am. Compl. Ex. B.)

Meanwhile, SBP neglected the parent application and failed to ever file the required Statement of Use proving use of the mark in commerce within the maximum deadline of thirty-six months from issuance of the Notice of Allowance. (Req. for Jud. Notice Ex. D.) Though the current USPTO database status for Serial No. 85/420,834 has not yet been updated, the application is now permanently abandoned for failure to timely file a Statement of Use. Plaintiff thus can assert no priority rights in the MUZOOK mark in connection with the services identified in the parent application, Serial No. 85/420,834 – this application is now immaterial to this action.

**C. Plaintiff's Lack of Actual Use Priority**

SBP's claim of priority rights in the MUZOOK mark over Muzooka as set forth in the Amended Complaint are based wholly on its applications filed the USPTO. The Amended Complaint contains no real factual allegations of actual use priority of SBP over Muzooka. SBP asserts in the Amended Complaint that it is "planning to offer for sale" (Am. Compl. ¶ 7) certain goods and/or services – the only conclusion from such allegations is that the MUZOOK mark is not in use with such goods and/or services. SBP has alleged use with its "internet presence and its downloadable products and in its business promotion activities." (*Id.* ¶ 13.) Not only is it impossible to determine the goods and/or services with which SBP has purportedly used the mark from such vague descriptors, but again, SBP alleges no priority date by which it obtained rights in its mark in connection with such goods and/or services. SBP further alleges vaguely that it "has *for several years*

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non-fiction; providing services in the nature of telecommunication services, namely, electronic transmission of voice, audio, visual images, and data by telecommunication networks; telecommunication access services, allowing for the creation of works and incorporating multiple media elements such as narrative textual content, music and illustrations in [emphasis added] engaged in promoting the production of creative works…" (whether in connection with the MUZOOK mark is not specified). (*See id.* ¶ 7.) The only tangible actual use date contained in the Amended Complaint is November 8, 2015, the date on which the *Meeggo, The Journey Begins* e-book purportedly became available for download on the Apple iTunes App Store. (*See id.* ¶ 17.) This date though is nearly four years after Muzooka began actual use of its mark in commerce, and nearly four years after Muzooka's definitive priority date of December 19, 2011, the date on which it applied for the MUZOOKA mark with the USPTO (Muzooka's Registration No. 4,448,314 confers priority rights in the mark dating to the filing date). (*See* Req. for Jud. Not. Ex. E.) Plaintiff's Amended Complaint thus fails to establish any priority rights owned by Plaintiff in the MUZOOK mark over Defendant.

**D. Plaintiff's Implausible Allegations of Likelihood of Confusion**

SBP further does not allege how or why confusion, deception, or mistake is likely to arise from use of the parties' marks. Its remaining allegations consist essentially of legal conclusions and recitations of the asserted causes of action. (*See, e.g.*, Am. Comp. ¶ 26 ("Defendant is now using the trademark, derivative, and/or colorable imitations of Plaintiff's Mark in connection with the proliferation of software and the distribution of electronically-delivered media, including audio, visual, and audiovisual works, in a manner that is likely to cause confusion or mistake or to deceive purchasers"); ¶¶ 35-50.) Mere conclusory statements regarding actual confusion without any factual detail whatsoever do nothing to support Plaintiff's claims. (*See id.* ¶ 28.) If Plaintiff was aware of any real instance of actual confusion, it would aver factual allegations regarding such instance. Plaintiff is clearly not aware of any actual confusion, and makes no genuine factual allegations regarding the same. These allegations may be disregarded.

Meanwhile, the attachments submitted with the Amended Complaint tell the clear story of two parties using disparate marks in connection with unrelated goods and/or services in vastly different marketing channels and in circumstances highly unlikely to give rise to consumer confusion. Because SBP has alleged no legitimate priority dates concerning its actual use of its purported goods

works of fiction and non-fiction for electronic devices such as smartphones, computers, e-readers, touchscreen computers, and tablets."

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and/or services, and certainly no dates which pre-date Muzooka's priority filing date, SBP is effectively limited to claiming rights in the MUZOOK mark strictly in connection with services listed in Registration No. 4,419,977, to the extent it is even still valid (which Muzooka strongly contends it is not). SBP attempts to claim that, "Like MuZook, Defendant has implemented the use of MUZOOKA in connection with an online music distribution service and storefront," (Am. Comp. ¶ 22), but as SBP's registration contains no such services or storefront, SBP's claim in this regard is immaterial and should be disregarded. SBP's services listed in Registration No. 4,419,977 are strictly telecommunication access services for connecting content creators. (*See id*. Ex. B.) Such services contrast sharply with the app and site for streaming music to consumers provided under Defendant's MUZOOKA mark. (*See id*. ¶ 22, Exs. H-N.) Plaintiff's allegations and attachments further show the parties' marketing channels and the circumstances in which consumers are encountering the parties' marks also differ vastly. (*See id*. Exs. A, E, H-N.) In all, Plaintiff's allegations of likelihood of confusion, and resulting infringement and unfair competition, are simply insufficient – the Amended Complaint makes no *plausible* claim for relief.

### E. Prior Case History

Despite these deficiencies, Plaintiff filed the instant lawsuit on January 6, 2014. Defendant, in conjunction with other now-dismissed Defendants, moved to dismiss the case from the United States District Court for the District of Delaware for failure to state a claim, improper venue, lack of personal jurisdiction, and insufficient service of process, and in the alternative, to transfer the case to this Court. On March 30, 2015, the District of Delaware granted Defendants' motion to transfer venue and thus deemed Defendants' motion to dismiss moot, and the case was transferred to this Court on April 16, 2015. Defendants again moved to dismiss the action on July 6, 2015 for, *inter alia*, failure to state a claim. (Dkt. No. 37.) The Court granted the prior motion to dismiss all claims for failure to state a claim on November 11, 2015, but with leave to amend. (Dkt. No. 64 at 19.) Plaintiff filed the present Amended Complaint on December 11, 2015. (Dkt. No. 65.) Because the Amended Complaint still fails in its allegations as a matter of law, Defendant now hereby moves to dismiss the Amended Complaint with prejudice and the action against Defendant in its entirety, and alternatively, for judgment on the pleadings in its favor.

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## III. ARGUMENT

### A. Legal Standard

#### 1. Failure to state a claim

Pursuant to Fed. R. Civ. P. 8(a), the complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The complaint must give "fair notice" of the claim being asserted and the "grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotes omitted); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002). The court should grant dismissal on a Fed. R. Civ. P. 12(b)(6) motion to dismiss where the complaint fails to set forth sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570 (2007); *accord Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While, the court must accept the plaintiff's factual allegations as true, *Anderson v. Clow*, 89 F.3d 1399, 1403 (9th Cir. 1996); *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986), conclusory statements and threadbare recitals of elements of a cause of action though are not entitled to a presumption of truth and will not suffice in establishing a plausible claim for relief. *Iqbal*, 556 U.S. at 678. Dismissal is appropriate both where there is an absence of sufficient facts alleged to support a cognizable legal theory or where there is no cognizable legal theory set forth in the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001) (citing *Balisteri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)).

Further, upon a motion to dismiss, the court may consider not only matters contained within and attached to the complaint, but also matters which may be judicially noticed. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986). Matters of public record, including pleadings, orders, and other papers on file in another court action, records and reports of administrative bodies, and legislative histories of laws, rules, and ordinances, may be properly judicially noticed, so long as the facts noticed are not subject to reasonable dispute. *Intri-Plex Technologies, Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007).

#### 2. Motion for judgment on the pleadings

Judgment on the pleadings is properly granted where there is no issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. *Fleming v. Pickard*, 581 F.3d

922, 925 (9th Cir. 2009) (citing *Turner v. Cook*, 362 F.3d 1219, 1225 (9th Cir. 2004)). In considering a Fed. R. Civ. P. 12(c) motion, the court applies the same standards applicable to a Fed. R. Civ. P. 12(b)(6) motion. *E.g.*, *Cafasso, U.S. ex rel. v. General Dynamics C4 Sys., Inc.*, 637 F.3d, 1047, 1054 n.4 (9th Cir. 2011); *Ross v. U.S. Bank Nat'l Ass'n*, 542 F. Supp. 2d 1014, 1023 (N.D. Cal. 2008). A motion for judgment on the pleadings addressing primary claims asserted by the plaintiff may be properly filed and heard after the defendant has filed an answer. *See NanoMech, Inc. v. Suresh*, 777 F.3d 1020, 1023 (8th Cir. 2015).

### B. The Complaint Fails in Its Legal Theory of Trademark Infringement and Related Unfair Competition

#### 1. Plaintiff does not own priority rights in a valid trademark

The Amended Complaint fails in its legal theory of trademark infringement and unfair competition against Defendants. In order to state a claim of trademark infringement, plaintiff must allege (1) ownership of a valid trademark, and (2) use by defendant in commerce of a mark likely to cause confusion with plaintiff's mark. *Network Automation, Inc. v. Advanced Sys. Concepts*, 638 F.3d 1137,1144 (9th Cir. 2011) (citing *Dep't of Parks & Recreation v. Bazaar Del Mundo Inc.*, 448 F.3d 1118, 1124 (9th Cir. 2006)). This standard applies not only for a claim of infringement of a federally registered mark under 15 U.S.C. § 1114, but also to a claim of federal unfair competition under 15 U.S.C. § 1125(a), *see Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp.*, 174 F.3d 1036, 1046 (9th Cir. 1999), and trademark infringement and related unfair competition claims under California state law, *see Mallard Creek Indus., Inc. v. Morgan*, 56 Cal. App. 4th 426, 429 (Cal Ct. App. 1997); *see also Pac. Sunwear of California, Inc. v. Olaes Enters., Inc.*, 167 Cal. App. 4th 466, 471 (Cal. Ct. App. 2008) (citing Ninth Circuit standard of infringement on state law claim).[3]

An ownership interest is demonstrated through priority of use. *See Wood v. Apodaca*, 375 F. Supp. 2d 942, 948 (N.D. Cal. 2005) (citing *Am. Petrofina v. Petrofina of Cal., Inc.*, 596 F.2d 896, 897 (9th Cir. 1979) ("[W]hosoever first adopts and uses a trade name, either within or without the

[3] Plaintiff's state and federal unfair competition claims, substantially unchanged from the original Complaint, are based upon Defendant's alleged infringing use of the MUZOOKA trademark and misappropriation of the goodwill associated with the asserted MUZOOK trademark. (*See* Am. Comp. ¶¶ 36-37, 47.) The analysis of the unfair competition claims thus follows that for the trademark infringement claim.

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state, is its original owner.")); *Sengoku Works Ltd. v. RMC Int'l, Ltd.*, 96 F.3d 1217, 1219 (9th Cir. 1996) ("It is axiomatic in trademark law that the standard test of ownership is priority of use.")

**a. The trademark registration upon which Plaintiff bases the action is invalid due to an improper assignment of ownership**

Plaintiff's Amended Complaint fails as a matter of law because Registration No. 4,419,977, upon which Plaintiff bases its assertion of ownership of priority trademark rights, is invalid due to an improper assignment executed by Plaintiff and its predecessor. 15 U.S.C. § 1060(a)(1) explicitly provides that "no application to register a mark under section 1051(b) of this title shall be assignable prior to the filing of an amendment under section 1051(c) of this title to bring the application into conformity with section 1051(a) of this title or the filing of the verified statement of use under section 1051(d) of this title, except for an assignment to a successor to the business of the applicant, or portion thereof, to which the mark pertains, if that business is ongoing and existing." "In other words, an [intent-to-use] applicant [who has not filed a Statement of Use or Amendment to Allege Use] may only transfer its application to another if it is transferred with at least the part of the applicant's 'ongoing and existing' business to which the mark pertains." *Creative Arts by Calloway, LLC v. Brooks*, 2012 U.S. Dist. LEXIS 182699, *14 (S.D.N.Y. Dec. 27, 2012).

"When an [intent-to-use] application is assigned in violation of Section 1060(a)(1) – for example, to an entity other than the successor of the applicant's 'ongoing and existing' business – the assignment *and, in turn, the ITU application for the registration of the mark*, are invalid [emphasis added]." *Id.* (citing *Fitzpatrick v. Sony-BMG Music Entm't, Inc.*, 2010 U.S. Dist. LEXIS 87584, *14 (S.D.N.Y. Aug. 24, 2010) (assignment of trademark "in gross" renders assignment invalid); *Clorox Co. v. Chem. Bank*, 40 U.S.P.Q.2d 1098, 1100, 1104 (T.T.A.B. 1996) (precedential) (prohibited assignment also voids intent-to-use application *and resulting registration*)).

There is no question here that the intent-to-use application, Serial No. 85/420,834, from which Registration No. 4,419,977 was eventually divided and matured, was assigned before Plaintiff or its purported predecessor filed any Statement of Use or Amendment to Allege Use. The application was assigned on October 1, 2011 (Am. Compl. Ex. C.); no Statement of Use was filed until July 14, 2013, and the operative Statement of Use was not filed until August 21, 2013 (Req. for

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Jud. Not. Ex. A.) This defect appears on the face of the Amended Complaint, and no further amendment can alter this fatal defect. The intent-to-use application giving rise to Registration No. 4,419,977 was assigned in violation of 15 U.S.C. § 1060(a)(1), and the said registration is therefore invalid. Because Registration No. 4,419,977 is invalid, the registration cannot confer any right of priority in the MUZOOK mark as of the filing date of the original application. *See* 15 U.S.C § 1057(c). Because Plaintiff bases its claim of ownership of priority trademark rights wholly on Registration No. 4,419,977 and the filing date thereof, Plaintiff's claims for trademark infringement and related unfair competition fail in a necessary element, and thus fail as a matter of law.

Plaintiff further does not fall into the statutory exception contained in 15 U.S.C. § 1060(a)(1). To establish that the business pertaining to the mark purportedly assigned with an intent-to-use application is "ongoing and existing," the intent-to-use applicant must be already providing the goods or services recited in the application in connection with the mark. *See Railrunner N.A. Inc. v. New Mexico Dep't of Trans.*, 2008 TTAB LEXIS 58, *7 (T.T.A.B. 2008) (defining "ongoing and existing business" as one that "is already providing the goods or services recited in the application"). Plaintiff here has claimed first use of the MUZOOK mark with the services listed in its application only as early as August 14, 2013, well after execution of the assignment agreement. The Amended Complaint and judicially noticeable facts establish that there was no ongoing and existing business under the MUZOOK mark at the time of assignment because use of the mark was years away. Plaintiff therefore cannot meet the statutory exception.

Even if the pleadings may be read to support the conclusion that SBP's predecessor was technically conducting some business at the time of executing the assignment, the pleadings and judicially noticeable facts clearly establish that there was no ongoing and existing business *in connection with or pertaining to* the MUZOOK mark. *See Greene v. Ab Coaster Holdings, Inc.*, 2012 U.S. Dist. LEXIS 136890, *24-25 (S.D. Ohio Sep. 25, 2012) ("Ab Coaster's position requires the Court to assume that there can be goodwill, as that term is used in trademark law, associated with the business of development of a product that will in the future be marketed with the use of a particular mark. The Greenes convincingly argue that there is no such thing in trademark law.") The operative Statement of Use for the MUZOOK mark and Registration No. 4,419,977 was not filed until August

21, 2013, and Plaintiff claimed a date of first use of the MUZOOK mark in such Statement of Use of August 14, 2013 – each date nearly two years after execution of the assignment. Use of the MUZOOK mark, or even tangential business activities related to use of the MUZOOK mark with the listed services, was almost two years away when the assignment was made. Goodwill can only accrue with the use of a trademark. *See Jim Henson Prods. v. John T. Brady & Assocs.*, 867 F. Supp. 175, 182-183 (S.D.N.Y. 1994) (explaining that prior to actual use, there is no assignable interest in a trademark). As Plaintiff was assigned the MUZOOK intent-to-use application almost two years before use of the mark began, there was no ongoing and existing business under the mark and no assignable interest in the mark at assignment, rendering the assignment, application, and resulting registration invalid. *See Greene*, 2012 U.S. Dist. LEXIS 136890 at *27 (finding that where plaintiff executed assignment of intent-to-use application over a year before filing Statement of Use and first use date, assignment violated 15 U.S.C. § 1060(a)(1) "because the mark was not in use.")

With its Registration No. 4,419,977 invalidated, Plaintiff can assert no priority trademark rights over Defendant. Plaintiff's claims thus necessarily fail.

**b. The parent application, Serial No. 85/420,834, is now abandoned, and the Amended Complaint is devoid of allegations regarding actual use priority**

SBP appears in the Amended Complaint to attempt to claim the priority filing date of the parent MUZOOK application, Serial No. 85/420,834, to allege ownership of priority trademark rights over Muzooka. This attempt is easily negated by clear public record. The total time available for filing the Statement of Use may not be extended beyond thirty-six months from the issuance date of the Notice of Allowance. 15 U.S.C. §§ 1051(d)(1)-1051(d)(2); 37 C.F.R. § 2.89(e)(1). If a Statement of Use is not filed by the end of thirty-six months, the application will be abandoned and cannot be revived. *See* 37 C.F.R. § 2.88(k). Plaintiff failed to file a Statement of Use for the parent MUZOOK application, Serial No. 85/420,834, within thirty-six months of issuance of the Notice of Allowance. (Req. for Jud. Not. Ex. D.) Application Serial No. 85/420,834 is now abandoned and cannot be

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revived.[4] This application thus cannot confer any right of priority in the MUZOOK mark as of the filing date of the original application. *See* 15 U.S.C § 1057(c).

As stated above at Section II(C), the Amended Complaint fails to allege virtually any genuine facts concerning the date upon which Plaintiff obtained actual use priority in the MUZOOK mark. *See Dep't of Parks & Recreation*, 448 F.3d at 1125-26 (plaintiff may claim priority trademark rights by alleging that it used its mark in commerce before defendant began using infringing designation). Plaintiff is vague in its Amended Complaint as to when it began actual use of the MUZOOK mark, alleging only that it has "has *for several years* [emphasis added] engaged in promoting the production of creative works…" under, apparently, some mark(s) – the Amended Complaint does not specify whether such use has been under the MUZOOK mark. (*See* Am. Comp. ¶ 7.) Aside from the filing date of the original MUZOOK application, the only other priority date asserted by SBP is November 8, 2015, the date on which it began offering an e-book on iTunes. This date is almost four years after Defendant both filed an application for and began using in commerce its MUZOOKA mark and thus firmly established priority rights in the MUZOOKA mark. (*See* Req. for Jud. Not. Ex. E.) Even taking the August 14, 2013 date of first use set forth in Plaintiff's Certificate of Registration (Am. Compl. Ex. B) as Plaintiff's actual use priority date, Plaintiff trails Defendant in priority by almost two years. Plaintiff's allegations fail to set forth priority of actual use by Plaintiff, and according ownership of priority trademark rights, as a matter of law. The fact that Plaintiff has still failed to allege facts establishing its priority over Defendant even after its original Complaint was held by the Court to be deficient clearly establishes that Plaintiff cannot properly allege such facts.

The Amended Complaint thus fundamentally and irrevocably fails in its allegations of Plaintiff's ownership of priority rights in a valid trademark. Plaintiff's claims are insufficient as a matter of law and should be dismissed with prejudice.

**2. The allegations of likelihood of confusion are implausible and fail as a matter of law**

Plaintiff's remaining allegations of infringement are nothing more than conclusory statements, threadbare recitals, and implausible assertions of likelihood of confusion between the

[4] While the USPTO database status shows the application as still alive, the application is indeed dead according to statute and regulation. It is only a matter of time, perhaps even days, before the USPTO corrects this ministerial issue and

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parties' marks. A court is clearly within its authority to determine likelihood of confusion upon a motion to dismiss where the claim of confusion is implausible. *Cintas Corp. v. UNITE HERE*, 601 F. Supp. 2d 571, 580 (S.D.N.Y. 2009). The Ninth Circuit has affirmed that a court is not precluded from determining likelihood of confusion as a matter of law "either through dismissal or summary judgment." *Murray v. Cable NBC*, 86 F.3d 858, 860-861 (9th Cir. 1996) (holding services – plaintiff conducting man-on-the-street survey studies vs. defendant conducting interactive polling services through a cable television program – sufficiently unrelated to establish no likelihood of confusion as a matter of law and dismissing case on Fed. R. Civ. P. 12(b) motion to dismiss).

Likelihood of confusion exists "when consumers are likely to assume that a product or service is associated with a source other than its actual source because of similarities between the two sources' marks or marketing techniques." *Int'l Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 825 (9th Cir. 1993) (internal quotation omitted). In determining whether likelihood of confusion exists in a certain case, courts in the Ninth Circuit look to the eight factors set forth in *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-354 (9th Cir. 1979): (1) strength of plaintiff's mark; (2) proximity or relatedness of the parties' goods or services; (3) similarity of the marks themselves in appearance, sound, and meaning; (4) evidence of actual confusion; (5) marketing channels used and degree to which such channels overlap; (6) type of goods or services and the degree of care likely to be exercised by the purchaser; (7) defendant's intent in selecting the mark; and (8) likelihood of expansion of the parties' product or service lines. These *Sleekcraft* factors are not exhaustive or exclusive, but "are intended to guide the court in assessing the basic question of likelihood of confusion." *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1290 (9th Cir. 1992). The factors should not be weighed rigidly, and plaintiff need not show that every factor weighs in its favor in order to establish likelihood of confusion. *Apple Computer, Inc. v. Formula Int'l, Inc.*, 725 F.2d 521, 526 (9th Cir. 1984). Further, marks should be considered in the likelihood of confusion analysis as they are encountered in the marketplace. *Sleekcraft*, 599 F.2d at 351; *see also* *Nutri/System, Inc. v. Con-Stan Indus., Inc.*, 809 F.2d 601, 605-606 (9th Cir. 1987).

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updates the database status to abandoned.

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One of the primary factors in the likelihood of confusion determination is the proximity or relatedness of the goods and/or services under the marks and degree to which they compete. *See Murray*, 86 F.3d at 860-861; *Brookfield Commc'ns*, 174 F.3d at 1054. "If the court determines as a matter of law from the pleadings that the goods are unrelated and confusion is unlikely, the complaint should be dismissed." *Murray*, 86 F.3d at 860 (citing *Toho Co. v. Sears, Roebuck & Co.*, 645 F.2d 788, 790-791 (9th Cir. 1981) (finding dismissal of Lanham Act § 43(a) claim proper based solely on unrelatedness of goods as a matter of law)). SBP does not allege how or why confusion, deception, or mistake is likely to arise from use of the parties' respective marks according to the *Sleekcraft* factors. Particularly, the parties' goods and/or services are unrelated as a matter of law. Confusion is not likely, and Plaintiff's claims should be dismissed.

Because SBP has alleged no facts concerning its actual use priority in the MUZOOK mark in connection with *any* goods and/or services, and certainly no dates which pre-date Muzooka's priority filing or first use date, in either the original Complaint or the Amended Complaint, SBP is limited to claiming rights in the MUZOOK mark strictly in connection with services listed in Registration No. 4,419,977, to the extent it is even still valid (Muzooka vehemently contends the registration is not valid and cannot support a claim of priority rights). The services listed in Registration No. 4,419,977 are: "Collaboration services, namely, telecommunication access services which allow parties to view, adapt, and share materials such as narrative textual content, music and illustrations in works of fiction and non-fiction to enable persons such as writers, musical artists and illustrators to collaborate with each other within or across disciplines to compare work over a publicly accessible network to compose e-books and works incorporating multiple media elements such as narrative textual content, music and illustrations in works of fiction and non-fiction for electronic devices such as smartphones, computers, e-readers, touchscreen computers, and tablets." (Am. Compl. ¶ 14, Ex. B.) Plaintiff's services thus consist of telecommunication access services which allow content creators to collaborate to form works accessible on smart devices and other consumer electronics. By contrast, as shown in the Amended Complaint, Muzooka's goods and/or services consist of a streaming music app and site similar in function to other streaming music platforms such as Spotify. End consumers access streaming music through Muzooka's MUZOOKA platform on Muzooka's proprietary,

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exclusive MUZOOKA app and website. Plaintiff's telecommunication access services thus contrast sharply with Defendant's music streaming goods and/or services for the public's ready consumption. The parties' goods and/or services are disparate and unrelated as a matter of law. As in *Murray*, these differences in the parties' goods and/or services are more than sufficient to establish that confusion is not likely as a matter of law.[5] In fact, the goods and/or services here are at least as unrelated if not more unrelated than the street survey services and television interactive polling services involved in *Murray*.

SBP's Amended Complaint highlights the differences in the parties' goods and/or services, as well as marketing channels and circumstances in which the marks are encountered in the marketplace. A consumer seeing Plaintiff's mark (Am. Comp. Ex. E) and Defendant's mark (*id.* Exs. H-I) sequentially in the marketplace is simply not likely to be confused as to source of the goods and/or services under the marks – the marks differ vastly in how there are actually used in the marketplace by the parties. The parties' marketing channels are also unique as the Amended Complaint shows Muzooka's goods and/or services available through its unique website muzooka.com and MUZOOKA app, as well as related social media networks, while SBP's services are shown strictly on SBP's alleged website muzook.com.[6]

To the extent SBP has offered an e-book on Apple iTunes, where Muzooka's MUZOOKA app may also be found, SBP has done so nearly four years after Muzooka began use of the MUZOOKA mark in such channels. To the extent the attachments to the Amended Complaint show screens from Plaintiff's website with music or other creative works available to users (*see* Am. Comp. Ex. E), the screens correspond precisely to the screens previously accessed by Defendant, on which, products and services cannot actually be obtained – attempts to purchase were met only with notices to "Please use a different payment method or contact the merchant." (Lee Decl., Dkt. No. 46-1, ¶ 4, Ex. C.) Such attachments thus do nothing to save Plaintiff's Amended Complaint. While the

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[5] Defendant in no way waives any further argument it may have regarding likelihood of confusion; rather, Defendant argues that the lack of proximity of the parties' goods and/or services alone is sufficient to establish no likelihood of confusion between the marks as a matter of law.

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screenshot documents from Plaintiff's alleged website showing these notices of unavailability are not necessarily already attached to the Amended Complaint, the Court may properly consider them on this Motion because the Complaint refers to the muzook.com website from which the screenshots have been taken and the said website's content, because the documents are central to Plaintiff's claim in that the muzook.com website purportedly shows Plaintiff's alleged infringed mark in use with Plaintiff's goods and/or services, and because Plaintiff itself has attached screenshots of the muzook.com website. *See U.S. v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011). Further, even if these items are actually available through contacting the merchant (Plaintiff) directly, this merely underscores that confusion is not likely between the marks as a matter of law because consumers must go through an entirely unique and disparate channel (contacting Plaintiff directly through Plaintiff's website) to obtain Plaintiff's goods and/or services. Additionally, even if, *arguendo*, Plaintiff's attachments show music and other creative works goods and/or services which are similar or related to Defendant's goods and/or services on Plaintiff's website, the Amended Complaint fails to establish Plaintiff's priority in connection with such goods and/or services; in fact, the pleadings and judicially noticeable facts firmly establish that Defendant owns priority rights in its mark in connection with music streaming goods and/or services over Plaintiff.

As established hereinabove, Plaintiff's further allegations of confusion, including as to actual confusion between the parties' marks, consist of conclusory statements and threadbare recitals which may be disregarded by the Court. Plaintiff's allegations fail to plausibly set forth likelihood of confusion between the parties' marks. Plaintiff's claims fail as a matter of law.

## IV. CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court dismiss the Amended Complaint with prejudice, and in the alternative, grant judgment on the pleadings in Defendant's favor in this action.

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[6] The e-book allegedly offered on Apple iTunes is immaterial. Muzooka's goods and/or services have nothing to do with books, and SBP began use, if any, of its mark with such e-book several years after Muzooka established priority rights over SBP.

Dated: December 29, 2015

Respectfully submitted,

By: */s/ Otto O. Lee*

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## CERTIFICATE OF SERVICE

I certify that on December 29, 2015, I electronically filed the foregoing **DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT, AND IN THE ALTERNATIVE, FOR JUDGMENT ON THE PLEADINGS** using the Court's CM/ECF system, which will provide service by email to the persons at the email addresses listed below.

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